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Docket No.

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CLERK

THE SUPREME COURT OF THE UNITED STATES

October, 1984 Term

STEVEN K. HAUSER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

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23 pp

QUESTION PRESENTED FOR REVIEW

IS IT A DENIAL OF EQUAL PROTECTION TO PROHIBIT A POLITICAL CANDIDATE TO DEDUCT FROM HIS INCOME TAXES NECESSARY EXPENSES IN TRYING TO GET ELECTED?

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I.

OPINIONS ISSUED

Hauser v. Comm. of Internal Revenue, T.C. Memo 1982-685 (Tax Court)

Hauser v. Comm. of Internal Revenue, Memorandum CA No. 83-7497 (U.S. Court of Appeals for the Ninth Circuit)

II.

STATEMENT OF GROUNDS FOR JURISDICTION

This request for a Writ of Certiorari is an appeal from a decision of the United States Court of Appeals for the Ninth Circuit affirming a decision of the Tax Court where it was held that the petitioner could not deduct campaign expenses paid by him as a candidate from his income taxes. On petitioner's 1978 income tax return, he listed $9,433 as employee business expenses. $7,045 of this amount was disallowed by the Internal revenue Service and a deficiency of $2,351 was declared.

Petitioner filed a petition on January 27, 1981, in the United States Tax Court requesting that no deficiency be found for the 1978 tax year. After a stipulation to the facts, the Tax Court heard argument on September 30, 1982. Petitioner's primary argument was that the Equal Protection Clause of the Constitution allows a political candidate to deduct necessary campaign expenses pursuant to allowance of business deductions. On March 30, 1983, the Tax Court's decision upholding the deficiency was filed. Petitioner appealed and a decision was rendered by the United States Court of Appeals for the Ninth Circuit in a memorandum dated June 20, 1984. That decision affirmed the ruling of the Tax Court. A Petition for Writ of Certiorari is now sought from this court.

III.
APPLICABLE STATUTES

Amendment XIV of the United States Constitution:

> "...Nor deny to any person within its jurisdiction the equal protection of the laws."

§162(e)(2)(A) of the Internal Revenue Code

> (e)(1) The deduction allowed by subsection (a) shall include all the ordinary and necessary expenses ....
> (2) LIMITATION - The provisions of ¶ (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise)-

(A) for participation in, or intervention in, any political campaign on behalf of any candidate for public office....

IV.

STATEMENT OF FACTS

During the tax year 1978, petitioner, a lawyer, was employed in the month of January as a public defender for the County of Los Angeles. During the year he also worked as a part-time consultant to a business in Palm Desert, California.

In 1978 petitioner campaigned for the California State Assembly to represent the 67th District in San Bernardino and Riverside Counties. Petitioner was a "newcomer" to politics, without political experience and he had never before held an elective office. Petitioner began his campaign activities on a full-time basis in February of 1978. The activities continued during 1978 until petitioner lost the general election in November of that year.

On his 1978 income tax return, petitioner claimed as employee business expenses an amount totaling $9,433. This amount included $7,045 attributible to petitioner's political campaign activities. Petitioner also paid $150 per month for a total of $1,650 during 1978 for room and board of his campaign manager which peti-

tioner did not claim as a deduction on his return, but now contends is a deductible item.

V.

ARGUMENT

A. EQUAL PROTECTION DEMANDS THAT A POLITICAL CANDIDATE BE ALLOWED TO DEDUCT EXPENSES THE SAME AS A BUSINESSMAN

The profit to society from philosophy should be of no less value than the profit of commerce. Political leaders and candidates are of at least equal value to society as businessmen. However, under the Tax Court interpretation of the Internal Revenue Code in the case at bar, these two groups are not treated equally.

The Internal Revenue Code is an all powerful political document that greatly influences much in our democratic society. The power to tax is the power to control. If true democracy is to be encouraged, that Code must be applied equally and fairly to all citizens. Political candidates should not be on any less footing than businessmen. Equal protection must allow deductibility of necessary campaign expenses by a political candidate.

The United States Supreme Court case of McDonald v. Commissioner of Internal Revenue, 323 U.S. 57, is a 1944 case decided by a 5 to 4 margin. The majority held that campaign expenses paid by candidates are not deductible. Petitioner is requesting that this court reanalyze the issues discussed in that case in light of current political realities. The political process in America has undergone great changes since 1944. Financial demands of a political campaign are much greater in this present age of mass media and computers.

The Court applied the Equal Protection Clause of the United States Constitution to the elective process in the case of Reynolds v. Sims, 377 U.S. 533 (1964). In that case, reapportionment was the issue and the court stated:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.
>
> Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.

A logical following of the above stated proposition is:

the Equal Protection Clause guarantees the opportunity for equal participation in the electoral process by all citizens desiring to be candidates.

A political incumbant starts a campaign with the advantage of office. Incumbancy attracts contributions which are in part deductible by the contributors. A challenger, whatever his circumstance, in most cases must spend his own money to overcome such an advantage. Nonductibility of personal campaign expenditures further discourages opposition to incumbants and discourages political newcomers. This "chilling" effect is contrary to the democratic process.

In a recent discussion of tax revision by the United States Senate Finance Committee, it was emphasized that the present tax structure is designed to give certain incentives to various groups and members of our society. Clearly there are many incentives for businessmen. For one wanting to run for public office and serve his community, state and nation, there are no tax incentives. This situation is not truly democratic, especially when it allows incumbants extra advantages at election time. A tax incentive for citizens to run for public office will have the effect of producing more candidates and thus

insure a better quality of leadership.

B. CAMPAIGNING FOR PUBLIC OFFICE IS ENGAGING IN A BUSINESS, ALBEIT THE PUBLIC'S BUSINESS, AND EXPENSES INCURRED THEREIN SHOULD BE ALLOWED TO BE DEDUCTED

Section 162 of the Internal Revenue Code allows one to deduct expenses incurred in a business. The case of Diggs v. Commissioner of Internal Revenue, 76 U.S. Tax Court Reports 888, at page 891, talks of allowing deductions for one performing the functions of public office.

> Section 162(a) allows as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including traveling expenses. The term "trade or business" includes the performance of the functions of a public office.

If one is allowed to deduct expenses once in public office, it must follow that getting elected is a part of the "business" of public office. Being a candidate for public office is doing the public a service by encouraging debate and offering the voters a choice. It is not a business in the sense of pure monetary gain, but because salaries are paid to office holders, it is definitely a business in terms of providing a livelihood.

Justice Hugo Black, dissenting in McDonald v.

Commissioner of Internal Revenue, ibid, at pages 69-70, speaks to this issue:

> I can hardly conceive that we should infer that [the Congress] wanted to penalize through its tax laws necessary campaign expenses, and thereby condemn a practice of campaigning that is as old as our country and which exists in every state of the Union. Unless our democratic philosophy is wrong, there can be no evil in a candidate spending a legally permissible and necessary sum to approach the electorate and enable them to pass an informed judgment upon his qualifications.
>
> Public officials in this country, many of whom must campaign for election, are almost universally paid for their services. That we do pay our public servants is not at all inconsistent with the fact that public service in a large measure represents an honest expression of the social conscience. Nor does individual dependence upon remuneration for such services detract at all from the high and uncompromising standards of those who perform public duties. Without monetary rewards, office-holding would necessarily be limited to one class only - the independently wealthy. Proposals to accomplish such a purpose were deliberately rejected at the very beginning of the Nation's history. I deny the existence of a public policy which, while permitting Congress to tax the income of elected public officials, bars Congress from allowing a deduction for necessary campaign expenses.

No distinction between pre-election and post-election should be made in determining deductibility of expenses incurred by public office holders and aspirants to public office. Fairness demands equal treatment.

C. SECTION 162(e)(2)(A) OF THE INTERNAL REVENUE CODE, IF APPLICABLE TO CANDIDATES, IS UNCONSTITUTIONAL

The Tax Court opinion in the case at bar says that Section 162(e)(2)(A) of the Internal Revenue Code does not allow a tax deduction for campaign expenses.[1] An examination of the House Report (House Report 1447 to accompany H.R. 10650, 87 Cong. 2d Sess. ((1962)), Cummulative Bulletin 405, 422) shows that this section was intended to restrict deductibility by lobbying and legislative organizations. There is no mention of any prohibition of deductibility by candidates themselves. It appears unlikely that Congress intended the Tax Court's interpretation.

This section, if intended by Congress to prohibit a candidate from deducting his necessary campaign expenses, has the effect of protecting incumbants. A political newcomer, such as petitioner, must overcome the advantage of the veteran to generate funds. Political veterans rarely need to pay for campaign expenses with their own money. The question then arises: Is it fair for the Congress to protect incumbancy in its tax policy? Clearly the answer is a resounding "No!" Such

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[1] T.C. Memo. 1982-685, Page 4.

is a denial of equal protection and a restriction on the democratic process.

The real issue in the case at bar has to do with democracy. Are we to allow a system that encourages only the rich or elite to hold themselves out as candidates for political office? Our American political system is not without flaws. But we have a duty to remedy those flaws whenever we can.

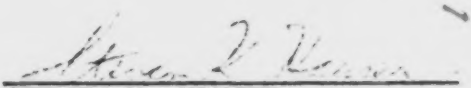
A system that allows a businessman to deduct his expenses while seeking a profit, yet denies the same opportunity to a citizen while seeking elective office, is making a value judgment about the worth to society of one over the other. Such judgment is contrary to the very heart of the meaning of the Equal Protection Clause of our Constitution. A citizen who enters into the philosophical debates about the structure and workings of our system, and who is actively seeking elective office, should be of no less value in our society as a pharmacist who opens a drug store on the corner of "Main Street America." Any other interpretation denies equal protection and represents a flaw in our political process.

VI.

CONCLUSION

For the reasons stated above, petitioner's Writ for Certiorari should be granted and this court should not allow the tax deficiency claimed by the Internal Revenue Service, thus allowing for the deductibility of one's own necessary campaign expenses for public office.

Respectfully submitted,



STEVEN K. HAUSER

In Pro Se

VII.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CA No. 83-7497

Tax No. 1650-81

STEVEN K. HAUSER,

Petitioner - Appellant

v.

COMMISSION OF INTERNAL REVENUE,

Respondent - Appellee.

[Filed June 20, 1984]

MEMORANDUM*

Appeal from the Decision of the
United States Tax Court
Submitted April 10, 1984

Before: FARRIS, BOOCHEVER, and NORRIS, Circuit Judges.

The panel unanimously agrees that this case may be submitted without oral argument.

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

Steven K. Hauser concedes that his campaign expenses are not deductible under the authority of McDonald v. Commissioner, 323 U.S. 57 (1944), but asks us to reexamine the McDonald decision in light of his equal protection claim. Hauser's equal protection argument is without merit. We are bound by McDonald.

AFFIRMED.

T. C. Memo. 1982-685

UNITED STATES TAX COURT

STEVEN K. HAUSER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 1650-81 Filed November 29, 1982.

Steven K. Hauser, pro se.

Steven Roth, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

DAWSON, Judge: This case was assigned for trial to Special Trial Judge Darrell D. Hallett, pursuant to the provisions of General Order No. 6, 69 T.C. XV (1978). The Court agrees with and adopts his report, which is set forth below.

OPINION OF THE SPECIAL TRIAL JUDGE

HALLETT, Speceal Trial Judge: Respondent determined a deficiency in petitioner's 1978

Federal income tax in the amount of $2,108.

The issue for decision is whether petitioner is entitled to a deduction for expenses incurred in connection with campaigning for election to public office.

Petitioner was a resident of Santa Monica, California at the time the petition was filed.

During the tax year 1978, petitioner, a lawyer, was employed as a public defender for the County of Los Angeles and he worked as a consultant to an attorney practicing in Palm Desert, California. During 1978 petitioner hoped to establish a private practice as an attorney in the future.

During 1978, petitioner campaigned for California State Assemblyman for the 67th District. Petitioner was a "newcomer" to politics without political experience and he had never before held an elective public office. Petitioner began his campaign activities in early 1978. The activities continued during 1978 until petitioner lost the general election in November of that year. During

the campaign, petitioner resided in an apartment he rented in San Bernardino, California. On February 1, 1978, petitioner's campaign manager moved to San Bernardino to assist petitioner in his campaign. Petitioner paid room and board for the campaign manager totaling $1,650 for 11 months during 1978. In July 1978, the campaign manager moved into petitioner's apartment and moved all his personal belongings with him. Petitioner ran his campaign from his apartment from January 1978 through August 1978, when petitioner moved his activities to a campaign headquarters. Campaign materials formerly stored in the apartment were moved to the campaign headquarters. Prior to that time, campaign paraphernalia was stored in the bedroom in the apartment, and petitioner conducted campaign activities in both the living room and dining room. Petitioner spent most of his time campaigning out of the apartment and in the field (precincts).

On his 1978 income tax return, petitioner claimed as employee business expenses an amount totaling $9,433. This amount included $7,045

attributible to petitioner's political campaign activities. In addition, petitioner claimed as a miscellaneous deduction $1,650 which represents a portion of petitioner's rent on his apartment. Petitioner also paid $150 per month or $1,650 during 1978 for room and board of his campaign manager which petitioner did not claim as a deduction on his return, but now contends is a deductible item.

The expenses incurred by petitioner, totaling $7,045, and which are attributible to petitioner's campaign activities, if deductible at all, must qualify for deduction under section 162 [1/] as ordinary and necessary expenses incurred in carrying on a trade or business.[2/] In McDonald v. Commissioner, 323 U.S. 57 (1944), the Supreme Court held

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1/ All section references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

2/ On the return, these expenses were deducted as unreimbursed employee business expenses. However, it has been stipulated that petitioner incurred no business expenses in connection with his employment with the County of Los Angeles, and that he was allowed a deduction for all expenses incurred in connection with his consulting work (which in any event was reported on the return as a sole proprietorship activity).

that campaign expenses of a public official seeking election are not deductible as expenses incurred in a trade or business. That rule has since been codified in section 162(e)(2)(A) and it has been consistently applied in subsequent cases. See Diggs v. Commissioner, 76 T.C. 888 (1981), on appeal (6th Cir.); Martino v. Commissioner, 62 T.C. 840 (1974). Petitioner recognizes the rule, but simply asks that we take this opportunity to change it. We decline to do so.

Petitioner also argues that his campaign expenses should be diductible because he was an attorney when the expenses were incurred, and at least part of his motivation for undertaking the campaign and incurring the expenses associated with it was to establish himself as an attorney in the district. However, in view of the flat prohibition upon deductibility of campaign expenses imposed by the Supreme Court, Congress, and by this Court, the possible enhancement of petitioner's opportunities in private practice clearly does not serve to make deductible expenses which are directly connected with campaigning for public office.

For the same reasons, petitioner's claim for a deduction with respect to the room and board expenses incurred by him for his campaign manager must likewise be disallowed.

Petitioner's claim for a deduciton with respect to the use of a portion of his apartment for campaign activities is governed by section 280A. The deduction claimed clearly does not qualify under that section. First, for the same reasons that campaign expenses have been held not to qualify as expenses incurred in connection with a "trade or business" within the meaning of section 162 and its predecessor, petitioner's apartment was clearly not the "principal place of business for [a] trade or business [of petitioner]." Moreover, petitioner has failed to prove that the apartment or any portion thereof was used "exclusively" and on a regular basis for activities which amount to a trade or business, nor has petitioner proven that the apartment was the "focal point" of business for a trade or business carried on by him. See Baie v. Commissioner, 74 T.C. 105 (1980).

Decision will be entered under Rule 155.